SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 69

JESSE MILLER SINCLAIR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[a]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9940

UNITED STATES OF AMERICA

v.

JESSE MILLER SINCLAIR, Appellant

Appeal from the Judgment and Commitment of the United States District Court for the Eastern District of Pennsylvania

APPELLANT'S APPENDIX

[fol. 1] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES

Sept. 8, 1948. True Bill.
Oct. 7, 1948. Plea: "Not Guilty."
Jan. 4, 1949. Waiver of jury trial filed.
Jan. 4, 1949. Trial (Ganey, J.) Witnesses sworn.
Jan. 4, 1949. Trial concluded.
Jan. 4, 1949. Defendant moves for judgment of acquittal C. A. V.
Feb. 15, 1949. Order of Court granting judgment of acquittal as to Count #2, and denying same as to Count #1, and entering a Verdict of Guilty as to Count #1, filed.
Mar 21, 1949. Sentence: (Count #1) Imprisonment for one year and one day.
Mar. 21, 1949. Notice of appeal filed. 3/21/49 copy to G. A. Gleeson.
Mar. 21, 1949. Copy of Clerk's statement of docket entries filed.
Mar. 21, 1949. In open Court: Bail pending appeal denied.
Mar. 23, 1949. Judgment and Commitment, filed. 2cc exit.
Mar. 23, 1949. Transcript of Testimony of Jan. 4, 1949, filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

INDICTMENT

Filed September 8, 1948

Count I

The Grand Jury Charges:

On or about July 14, 1948, at Media in the Eastern District of Pennsylvania, Jesse Miller Sinclair did knowingly and unlawfully deposit and cause to be deposited for mailing and delivery by the Post Office establishment of the United States, certain non-mailable matter, to wit: a certain obscene, lewd and lascivious letter and writing, which said letter and writing was enclosed in an envelope addressed and directed to Grace Somers, 234 West Summit, Haddonfield, New Jersey, which letter and writing is too obscene, lewd and lascivious to be set forth upon the records of this Honorable Court, but profert whereof is here made; in violation of Section 1461 Title 18 U. S. C. A.

• • • • • • •

True Bill

(S.) August E. Post, Foreman.

(S.) Gerald A. Gleeson, United States Attorney.

[fol. 3] IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE

GOVERNMENT'S EVIDENCE

Mr. Wolov: Mrs. Somers, take the stand.

PHOEBE SOMERS, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolov:

Q. Mrs. Somers, will you keep your voice up so that we can all hear.

Do you know the defendant in this case, Jesse Miller Sinclair?

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A. Yes, I do.
Q. How do you know him?
A. Mr. Sinclair married my daughter.
Q. Married your daughter?
A. Yes, sir.
Q. What is your daughter's name?
A. Grace Somers.
Q. Where do you live now, Mrs. Somers?
A. 234 W. Summit, Haddonfield, New Jersey.
Q. Where did you live in 1948?
A. This same address.
Q. Did you ever get any mail from Mr. Sinclair, the defendant?
A. Yes.
Q. Do you recall getting any mail from Mr. Sinclair on or about July 14, 1948?

Mr. Gray: If Your Honor please, the matter of mailing will not bind this defendant until some further proof may be offered before Your Honor.
The Court: I will take it subject to that reservation.

[fol. 4] By Mr. Wolov:

Q. All right, now, Mrs. Somers, did you ever see these letters before? (Producing same.)
A. Yes, I have.
Q. When and where did you see them?
A. They were delivered by the postman in my mailbox.
Q. Do you recall when?
A. July 15.
Q. Of what year?
A. 1948.
Q. Now, I show you letter addressed to Grace Somers, 234 W. Summit, Haddonfield, New Jersey——

Mr. Gray: Just let me glance at that.

By Mr. Wolov:

Q. —and ask you whether you received that in the regular course of the mail?
A. That letter was received along with the one received by me that same day.
Q. Addressed to you?
A. Yes, one addressed to me.

Q. I show you one addressed to Mrs. Ernest Somers, and ask you if that was delivered at the same time (producing same)?

A. Yes.

Q. By the mailman.

A. Yes, sir.

Q. Now, that letter addressed to Grace Somers, did you open that and read it?

A. I did not.

Q. What did you do with that when you received it?

A. I turned it over to Miss Grace Somers.

Q. That is Mrs. Sinclair, your daughter?

A. Yes.

Q. And the letter addressed to yourself, did you open that or read it?

A. I did.

[fol. 5] Q. When you gave that to your daughter, did you see your daughter open it?

A. She did open it in my presence and started to read it but couldn't finish,—it was horrible.

Mr. Gray: I ask that that be stricken—that it was horrible.

Mr. Wolov: All right, that is agreed to.

By Mr. Wolov:

Q. After you read the letter that was addressed to you, what did you do and what did Mrs. Sinclair do with these letters?

Mr. Gray: Now, that is objected to. We are charged with one offense, that is, sending these letters through the mail, and we are not charged with anything else beyond that. I think that is the subject matter before Your Honor and the only thing to which the District Attorney should address himself. Anything that this lady could have done—unless it is your intention to show she delivered them to the authorities, I have no objection to that.

Mr. Wolov: That is correct.

Mr. Gray: I am sorry.

Mr. Wolov: The indictment is laid in two counts.

The Court: That is right.

By Mr. Wolov:

Q. What was done with the letters after they were read?

A. We kept them until Mr. Somers came home, and then

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Mr. Somers and I decided they should be turned over to the proper authorities.

Q. And you took them to the post office inspector?

A. To the post office authorities.

Q. The letter that is addressed to you—have you ever seen your son-in-law's handwriting?

[fol. 6] A. I did, many times.

Q. Could you tell me who wrote that letter?

A. He did.

Mr. Gray: One question there. Did you see him write?

The Witness: Yes, I have seen him write.

Mr. Gray: All right.

Mr. Wolov: At this point I offer in evidence, to be marked Government's Exhibits 1 and 2, the letters, the subject matter of this suit.

Mr. Gray: I am objecting to that at the present time. My friend needs to go a little further before they can be received in evidence; he has got to prove that they were deposited by this defendant in the mails. He may be able to prove that—I don't know.

Mr. Wolov: I will.

The Court: I think that is right. I will take it subject to the objection.

Mr. Wolov: I want to offer this in evidence——

Mr. Gray: No objection to marking it for identification.

By Mr. Wolov:

Q. You say you took them to the post office inspector?

A. Yes.

Mr. Wolov: Cross-examine.

Cross-examination.

By Mr. Gray:

Q. Madam, your daughter was living with you?

A. Pardon me.

Q. Your daughter was living with you?

A. Well, now—she was staying there.

Q. How long had she been staying there?

[fol. 7] A. She had been staying there because they had no home.

Q. Not because—how long?

A. Few months.
Q. Mr. Sinclair was not staying there?
A. He was coming there weekends.

Mr. Gray: That is all.
Mr. Wolov: Mr. Mayfield.

EDGAR L. MAYFIELD, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolov:

Q. You are connected with the United States Government?
A. Yes.
Q. What capacity?
A. Post office inspector.
Q. Located where?
A. Camden, New Jersey.
Q. Mr. Mayfield, I show you these two letters, and ask you whether you saw these before?
A. Yes, I have seen them.

Mr. Gray: Which one is which?
Mr. Wolov: One is the letter addressed to Grace Somers, that will be marked Exhibit 1.

(The letter referred to was marked as Government's Exhibit 1 for identification.)

And the other is addressed to Mrs. Ernest Somers, Exhibit 2.

(The letter referred to was marked as Government's Exhibit 2 for identification.)

[fol. 8] By Mr. Wolov:

Q. How did you get these letters?
A. These letters were turned over to me by Mrs. Sinclair, her mother and father, Mr. and Mrs. Somers, in our office at Camden, New Jersey, around the middle of July, 1948.
Q. What did you do with them?
A. As both of these letters were postmarked in Pennsylvania, outside of my territory, I forwarded them to the inspector in charge, Philadelphia, Pa.

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Mr. Wolov: That is all.
Mr. Gray: No questions.
Mr. Wolov: Mr. Burdon.

JOHN D. BURDON, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolov:

Q. Mr. Burdon, you are connected with the United States Government?
A. Yes, sir.
Q. What capacity?
A. Post office inspector.
Q. How long have you been post office inspector?
A. Almost eight years.
Q. Now, you have before you, I believe, Government's Exhibits 1 and 2?
A. Yes, sir.
Q. Did you have these letters in your possession before?
A. Yes, sir.
Q. How did you get them?
A. They were turned over to me by the post office inspector in charge of Philadelphia for investigation.
Q. Now, with these letters, what did you do?
[fol. 9] A. Well, the complaint from the addressees of the letters indicated they were written and mailed by Jesse Miller Sinclair, who at that time resided at 30 Chester Pike, Ridley Park, Delaware County, Pa.
A few days after I received them, which was July 21, 1948, I visited Mr. Sinclair where he either boarded or roomed, or had an apartment, I don't know which, but he stayed there for sometime——
Q. Where was this?
A. Ridley Park.
I exhibited the letters to Mr. Sinclair, and he admitted writing——

Mr. Gray: Tell us what he said, not your conclusion.
The Witness: He told me. "Yes, I had written that letter"—this letter (indicating), but denied writing this letter (indicating).
Mr. Gray: Which one?

By Mr. Wolov:

Q. That is Government's Exhibit 1 letter?
A. Yes, sir.
Q. To Grace Somers?
A. Yes, sir.

The Court: To whom is it addressed?
Mr. Wolov: Grace Somers.
The Witness: Grace Somers.

By Mr. Wolov:

Q. Did you ask him whether or not he had mailed it?
A. Yes, sir.

Mr. Gray: He is a post office inspector, and I think that he can testify himself.

The Witness: During the course of our conversation Mr. Sinclair was more or less offended that I came to the place [fol. 10] where he stayed to talk to him, and apparently to get rid of me he agreed to initial this particular letter to signify that it had been written and mailed by him.

He agreed to come the following day with his lawyer to my office at 30th and Market Streets Post Office, but he never came there.

By Mr. Wolov:

Q. But he initialed the letter addressed to Grace Somers as having been the letter that he wrote?
A. Yes, sir.
Q. That is dated 7-21-48?
A. Yes, sir.
Q. That is the date of the initialing?
A. Yes, sir.
Q. Will you take a look at that letter marked Government's Exhibit 1 and tell me whether or not there is a postmark on that letter?
A. Yes, sir.
Q. Will you read it to me?
A. It is postmarked at Media, Pa., July 14, 1948, 12:30 P. M.
Q. What does that indicate to you?
A. That means that it was mailed in the Media Postal District and was cancelled by the postage machine in the Media Post Office, and then the letter was subsequently

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handled and dispatched to the Haddonfield, New Jersey, Post Office, for delivery by the regular mailman.

Q. Will you now look at the letter that is marked Government's Exhibit 2 and tell us whether there is a post mark on it?

A. Yes, sir.

Q. Will you read that postmark?

A. It is postmarked Chester, Pa., July 14, 1948, at 2:30 P. M.

Q. What does that indicate to you?

A. That indicates that this letter was mailed within the delivery district of the Chester, Pa., Post Office, and [fol. 11] later cancelled by the cancelling machine in the Chester Post Office, and dispatched to Haddonfield, New Jersey.

Q. Did you question him about that second letter?

A. Yes, sir.

Q. What did he say about that?

Mr. Gray: He already said he denied writing it.

The Witness: As I said before, he was not very co-operative——

Mr. Gray: Now, I ask that that be stricken from the record. I must keep my record straight no matter whether we waive a jury trial or not, sir.

The Witness: He said he would rather come to the office and talk to me about the letters, and as I said, he agreed to initial one letter indicating that he had written and mailed it.

By Mr. Wolov:

Q. I believe you testified he never did come to your office afterwards?

A. That is right.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Wolov: At this point I want to offer in evidence these letters——

Mr. Gray: Offer one at a time.

Mr. Wolov: I am offering the letter that is marked Government's Exhibit 1, addressed to Grace Somers, 234 W. Summit, Haddonfield, the one that is initialed.

Mr. Gray: I do not believe I can make any objection to that.

(The letter referred to, marked Government's exhibit 1, was filed with these proceedings.)

Mr. Wolov: And I want to take a look at this—you want to look at this too?

Mr. Gray: No, I have seen it before.

Mr. Wolov: I also offer in evidence the letter marked [fol. 12] Government's Exhibit 2, addressed to Mrs. Ernest Somers, 234 W. Summit, Haddonfield, New Jersey.

Mr. Gray: To which I am making objection because of the fact that the evidence isn't sufficient to justify it being admitted under the section of the act by which the defendant is charged. I can elaborate on that if Your Honor desires.

The. Court: You mean Section 1461?

Mr. Gray: Yes, sir. In other words, there is no evidence here as charged in the indictment and as required for the mailing of that letter.

I raise no question about No. 1 for this reason, the corpus of the offense, that is, a letter being mailed without the person being identified, establishes the fact that someone did that. Now, then, he has initialed that letter, and therefore I am not objecting to that.

On the other hand, the other letter that was received through the mail, he denied the fact that he wrote the letter and mailed it, and there has been no proof that he mailed it, and proof of mailing of the letter by the defendant is necessary under the law.

Mr. Wolov: I believe the fact that the witnesses identified the handwriting of the defendant here, and the fact that it was received in the usual course of the mail, through the regular channels of the United States Government Post Office Department, I believe that is sufficient to constitute the mailing of the letter.

Mr. Gray: Yes, sufficient to prove the mailing of the letter but insufficient to prove the one necessary element, that this defendant mailed it. The indictment charges that he deposited it in the mailbox——

Mr. Wolov: The fact that it was in his handwriting indicates that he wrote the letter and mailed it—that is a matter of defense to deny that.

Mr. Gray: Oh, no, the letter might be in my writing but that wouldn't prove that I mailed it.

[fol. 13] May I call Your Honor's attention to the language of the indictment, Count 1, that he did on or about a certain

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date, knowingly and unlawfully deposit and cause to be deposited for mailing and delivery by the Post Office establishment of the United States, certain unmailable matter, to wit, and then it goes on, but this letter, I must object to, because I do not think he has complied with the requirements.

The Court: Well, it would seem to me that Mr. Gray's contention is very persuasive. It may be that I might write a letter, but the gist of the offense is the mailing, not alone the writing. Would you say it would be an offense if I wrote a letter and let it lie around until someone placed it in the mail? I may have changed my mind and not wanted to mail the letter, and yet someone came around and took the letter off my desk and mailed it. Certainly, I couldn't be guilty of an offense.

Mr. Gray: No, I agree——

The Court: Is it a presumption that one who writes a letter mailed it? How do you bridge that?

Mr. Wolov: I think the presumption is there. Of course, it is a matter of defense——

Mr. Gray: I think my friend is very weak in his presumption, and very weak in his proof, because I do not believe it is sufficient——

The Court: Is there any presumption that he mailed it? I am really asking as a matter of inquiry.

Mr. Gray: As a matter of law there isn't any presumption—there is never any presumption that a man commits a crime.

The Court: In other words, it is requisite that I not only write the letter but actually mailed it?

Mr. Gray: Or causing it to be mailed.

[fol. 14] The Court: Or causing it to be mailed.

Mr. Wolov: That is right.

The Court: I think I will have to sustain Mr. Gray's objection.

Mr. Wolov: I offer in evidence the first letter.

Mr. Gray: You did already, and I have no objection to that.

Mr. Wolov: And I believe Your Honor should read that, because it becomes the Government's case.

The Court: That is the letter that is marked——

Mr. Wolov: Government's Exhibit 1.

The Witness: Yes, sir.

Mr. Wolov: We rest.

MOTION FOR JUDGMENT OF ACQUITTAL

Mr. Gray: I move for judgment of acquittal in this case.

(Argument of counsel on motion.)

(Reply argument by Mr. Wolov.)

The Court: All right, I will reserve decision now.

Mr. Gray: And I can make an additional motion if Your Honor reserves decision.

I suppose we will be advised by the Court Clerk as to when Your Honor will want us here?

The Court: Are you going to put on any defense?

Mr. Gray: I am not putting in any defense.

The Court: You do not wish to be heard on the factual side?

Mr. Gray: No, I do not think there is anything to be said on the factual side.

[fol. 15] The Court: All right, I will look into this at the earliest possible time, and I shall render a final decision on it.

Mr. Gray: And we will be advised?

The Court: Yes, your office will be called.

(Trial closed.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

H. A. B. Schwartz, Court Reporter.

March 23, 1949.

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[fol. 16] GOVERNMENT'S EXHIBIT 1

(Envelope)

(Postmarked Media, Pa., Jul 14 12:30 PM 1948)

Grace Somers
234 W. Summit
Haddonfield
New Jersey

JDB
7-21-48 JMS

Mrs. B saw
the bank books
etc.

JDB
7-21-48 JMS

I and one friend of yours tried to help—you would not let us! You had fainting spells and fell, hurting yourself—don't blame me. Have you told your family how many men you have fucked and sucked their cocks? You are wasting your time—you left only a "rubber" and a box of Kotex—all were thrown out (over) weeks ago—as to money I have plenty—I had 3 (three) deposit books at 3 (three) banks—recently I received $5000. I expect more up to $100,-000—possibly even a greater sum—since you want trouble we shall have it—I wanted to be friendly.

Daily Horoscope
Wednesday, July 14

• • • • • • •

September 24 to October 23 (Libra)—Mixed aspects all day. *Ill-humor and bad manners will affect achievement, lower prestige.* Avoid worry, fussing. And *remember, success is not always continuous.*

• • • • • • • •

[fol. 17] IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—Filed March 23, 1949

On this 21st day of March, 1949 came the attorney for the government and the defendant appeared in person and by Counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty as to Count #1 of the offense of depositing in the United States mails obscene letters as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and (1) day.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. Cullen Ganey, United States District Judge.

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[fol. 18] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9940

UNITED STATES OF AMERICA

v.

JESSE MILLER SINCLAIR, Appellant

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

Argued May 2, 1949

Before Maris, Goodrich, and McLaughlin, Circuit Judges

OPINION OF THE COURT—Filed May 5, 1949

Per CURIAM:

The appellant was convicted by the district judge, sitting without a jury, on the charge of sending an obscene lewd and lascivious letter to his wife through the mails. Appellant's argument has failed to convince us that his conviction was not fully justified by the evidence or that the trial judge erred in point of law.

The judgment of the district court will be affirmed.

A true Copy: Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 19] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9940

UNITED STATES OF AMERICA

v.

JESSE MILLER SINCLAIR, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Maris, Goodrich and McLaughlin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court:

Maris, Circuit Judge.

May 5, 1949.

Endorsements: Judgment Affirming Judgment of District Court. Received & Filed May 5, 1949. Ida O. Creskoff, Clerk.

[fol. 20] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, and proceedings in this Court, in the case of United States of America vs. Jesse Miller Sinclair, Appellant, No. 9940, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 10th day of May in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the one hundred and seventy-third.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

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[fol. 21] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 783

JESSE MILLER SINCLAIR, Petitioner,

v.

UNITED STATES

STIPULATION

Now comes the parties in the above-entitled cause and stipulate that the applications for and orders denying the petitioner's release on bail need not be printed as part of the record.

——— ———. Philip B. Perlman, Solicitor General.

Dated this 12th day of May, 1949.

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[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1948.

No. ~~783~~. 69

JESSE MILLER SINCLAIR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID BERGER,
JACOB KOSSMAN,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1948.

No. .

JESSE MILLER SINCLAIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jesse Miller Sinclair, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Court of Appeals for the Third Circuit, in a *per curiam* opinion affirming the Judgment of the Eastern District of Pennsylvania convicting petitioner of a violation of Section 211 of The Criminal Code, as amended, 18 U. S. C. A. Section 1461.

Petitioner was sentenced to imprisonment for one year and a day following his conviction by the Trial Judge sitting without a jury. Applications for bail were denied by the District and Circuit Courts. Petitioner has been imprisoned since March 21, 1949, date of his conviction. The opinion and mandate of the Court of Appeals were filed on May 5, 1949.

A.

STATEMENT OF THE CASE.

Petitioner was indicted on September 8, 1948, charged with knowingly depositing for mailing an obscene, lewd and lascivious letter dated July 14, 1948. The letter was sent to Petitioner's wife (R. 3a) whom he had been seeing weekends (R. 7a). It was turned over to the Postal Inspector by petitioner's wife (R. 8a) and she initiated a complaint against him (R. 9a). The letter is set forth at page 16a of the Record.

B.

THE QUESTIONS PRESENTED.

The following questions arise as a result of the action of the trial court as affirmed by the Court of Appeals:

(1) Can a confidential communication between a husband and wife be the basis for a prosecution and conviction of a spouse for violation of the Postal Laws?

(2) Is a letter from a husband to his wife disclaiming responsibility for her illness and charging it to her sexual misconduct with other men "obscene, lewd or lascivious" within the meaning of 18 U. S. C. A. Section 1461?

(3) Does the application of the statute making it a criminal offense for a husband to mail such a sealed letter to his wife constitute an unreasonable control of the post and a violation of petitioner's right of freedom of speech guaranteed by the First Amendment?

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C.
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

In the decision sought to be reviewed the Court of Appeals has decided an important question of federal criminal law with a *per curiam* two sentence opinion citing no authority (no opinion was filed by the District Court) in a way probably in conflict with the decision of your Honorable Court in *Wolfle v. United States*, 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, which upholds the immunity from disclosure of a confidential communication between spouses and its use for convicting the sender-spouse who had not previously disclosed the letter; the Court of Appeals has decided an important federal question involving the meaning of the obscenity statute in a way probably in conflict with the decisions of the Second Circuit recognizing the doctrine of privileged use of the mails protecting against criminal prosecution those who might, by literal application of the Statute, otherwise be guilty of violating it. The decision sought to be reviewed invades petitioner's constitutional rights protected under the First Amendment. There is nothing dangerous in the sending of such a letter by a husband to his wife which can or should be forbidden by the State (there is no publication), and certainly there is no clear and present danger to our government or its institutions which could justify such censorship of the mails.

If the decision sought to be reviewed is permitted to stand it will mean that no husband who believes his wife has committed serious sexual misconduct with other men could write to her in *non-legal terms* without subjecting himself to federal criminal prosecution for mailing an *obscene* letter.

WHEREFORE, your petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and send to this

Court for its review a full and complete transcript of the record of all proceedings in this suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated May 12, 1949.

JESSE MILLER SINCLAIR,
Petitioner.

By DAVID BERGER,
JACOB KOSSMAN,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

Petitioner's Letter to His Wife Was a Confidential Communication and Hence Absolutely Privileged.

The communication in this case was a handwritten letter by the husband to his wife and opened by her (R. 4a).

There can be no doubt of its purely personal, confidential character. Counsel for the respondent conceded this in the Court below; there is therefore no need to rely upon the presumption that all marital communications are confidential. 8 *Wigmore on Evidence,* (3d Ed.) pp. 640-641.

The expression in the letter "Have you told your family how many men . . . " does not mean that the wife is to show *this letter* to her family. It asked petitioner's wife a question, and is obviously an attempt by a husband to shift the responsibility for his wife's illness. It is not a direction either express or implied, to reveal the contents of the letter itself. Merely because a husband writes to his wife reproaching her for misconduct does not detract from the confidential character of the communication nor deprive it of the privilege which protects against its disclosure without the sender's consent. *Lanham v. Lanham,* 105 Texas 91, 145 S. W. 336.

The problem of the effect of confidential communications coming into the possession of a third person surreptitiously does not arise in the instant case because the evidence reveals that the letter was turned over by petitioner's wife to a postal inspector (R. 9a). Obviously a letter obtained from the addressee-spouse by voluntary delivery is still privileged else the privilege could, by collusion, be practically nullified for written communications. 8 *Wig-*

more on Evidence (3rd Ed.) Page 655. *McKie v. State*, 165 Ga. 210, 140 S. E. 625; *New York Life Ins. Co. v. Ross*, 30 F. 2d 80 (CCA 6); cert. denied 279 U. S. 852.

In *Wolfle v. United States*, 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, a case involving the *use of the mails* to defraud, in which a husband dictated a letter to his stenographer and, after transcription, sent it to the wife, this Court stated:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

In the instant case the communicating spouse made no voluntary disclosure of the letter to a third person. Hence, it remains privileged.

This privilege is regarded even more highly than that causing disqualification of a spouse from testifying against the other spouse. Marital disqualification ceases upon death or divorce of one spouse; the privilege protecting communications between husband and wife extends even after death or divorce of either. 8 *Wigmore on Evidence*, (3d ed.) Secs. 2331, 2334 and 2341; see *U. S. v. Mitchell*, 137 F. 2d 1006 (C. C. A. 2).

None of the exceptions recognized by the common law (where the husband is indicted for a crime against his wife) are here applicable. In this case, petitioner is charged with violating the postal laws. He was neither indicted nor tried for committing a crime against his wife. He did not commit any crime against her.

Consequently, the letter was privileged and could not be the basis for either a prosecution or conviction of petitioner.

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II.

The Letter Written to and Received by Petitioner's Wife Is Not Obscene, Lewd or Lascivious Within the Meaning of 18 U. S. C. A. Section 1461.

There is a clear cut distinction between obscene matter which is non-mailable because it is "obscene, lewd or lascivious" and that which is barred because it is "filthy." The statute as originally enacted barred only "obscene, lewd or lascivious" matter. In *Swearingen v. U. S.*, 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, this Court held that by the three words Congress meant to convey only one thought. The Court stated:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter *to corrupt the morals of the people.* The words 'obscene', 'lewd' and 'lascivious', as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.* Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, *calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.*" (Emphasis supplied.)

In the *Swearingen* case the asserted non-mailable matter was a newspaper article which described a certain person as a "red headed mental and physical bastard that flings filth under another man's name" and as one who would sell his mother's honor and "pimp and fatten on his sister's shame with as much unction as a buzzard gluts in

carrion", as one who was known as the companion of strumpets, who had "reveled in lowest debauches," and otherwise called the person a coward, liar, pimp, poltroon, and one who could be easily bought.

This Court held the language not obscene, lewd or lascivious within the meaning of the Act. It should be noted that an obscene libel at common law involved publication. In this case there is present simply a private communication between husband and wife.

By the Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, 18 U. S. C. A. Section 334, the words "and every filthy" were added to the Act. The legislative history of this amendment reveals that *another and new class of nonmailable matter was intended by the use of this phrase.* (See 43 Cong. Record, part 1, p. 284):

> "Mr. Moon of Pennsylvania. Mr. Chairman, one word on behalf of the committee. I have no doubt Congress originally intended to create two distinct classes of nonmailable matter by the existing section. Indeed, the decision of the circuit court prior to the time of the Swearingen case had defined the word 'obscene,' or 'obscenity,' as that form of indecency which is calculated to promote the general corruption of morals. They had defined lewdness and lasciviousness as that form of immorality which has respect to sexual impurity. However, that distinct classification was overturned by the Supreme Court decision in the Swearingen case, which decided that owing to the juxtaposition of the words 'obscene,' 'lewd,' and 'lascivious' Congress had created but one class. Therefore feeling that Congress originally intended to create these two distinct classes of prohibition, on behalf of the committee I am entirely willing to put this language in the form offered by the gentleman from Tennessee (Mr. Houston), *which I think does create another class and a class that the department informs*

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us it is very necessary should be excluded from the mails." (Emphasis supplied.)

In *U. S. v. Limehouse,* 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. ed. 843, the defendant was charged with the unlawful deposit of "a certain filthy letter and writing." Interpreting the Act, Justice Brandeis stated:

"The letters contain much foul language; charged the addresses or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term. On the ground that no letter was obscene, lewd or lascivious within the meaning given to those terms in Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, the District Court sustained a demurrer and quashed the indictment. . . . In Swearingen v. United States, decided in 1896, the indictment was under Revised Statutes, Section 3893, U. S. C. Title 18, Section 334, which made unmailable only 'obscene, lewd or lascivious' matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not 'calculated to corrupt and debauch the mind and morals of those into whose hands it might fall' and induce sexual immorality. 161 U. S. at 451, 40 L. ed. 766, 16 S. St. 562. The indictment here under review contains no reference to 'obscene, lewd or lascivious'. The charge is of depositing 'a certain filthy letter'. It is brought under the amendment to Section 3893 of the Revised Statutes made by Section 211 of the Criminal Code, Act of March 4, 1909, Chap. 321, 35 Stat. at L. 1088, 1129, U. S. C. Title 18, Section 334, which inserted the words 'and every filthy'. Now the clause reads 'every obscene, lewd or lascivious, and every filthy book, ... letter.'

> 'The Lower Court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of noscitura sociis, gave to 'filthy' the meaning attributed in the Swearginen case to the words 'obscene, lewd, or lascivious'. Thus, the Court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment, Congress added a new class of unmailable matter,—the filthy . . ."

It is thus clear that the Court has sharply differentiated between language that is obscene, lewd, or lascivious and language which is filthy. *Hence, an indictment charging the depositing of an obscene, lewd or lascivious letter cannot be sustained by proof of a letter that is filthy but not obscene, lewd or lascivious.*

The test whether a letter is obscene, lewd or lascivious is: does the language used have a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd or lascivious desires and by inducing sexual immorality? *Swearingen v. U. S., supra; Dysart v. U. S.*, 272 U. S. 655, 71 L. ed. 461, 47 S. Ct. 234. Merely because it may be difficult to determine whether a particular writing is obscene or filty (*Roth v. Goldman*, 172 F. 2d 788 (C. A. 2)) cannot justify the ignoring of this distinction.

In the instant case there is nothing in the letter that would incite or excite sexual desires or passions in the wife-addressee nor was that the intent of the writer. This letter may be abusive, insulting and one that would arouse the indignation, anger and resentment of the recipient, but not sexual passions or desires. Quite the contrary. The reading of this letter instead of debasing the morals of the decent, correct and moral minded would have the very op-

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posite effect. The letter is a bitter, perhaps indelicate, complaint by a husband to his wife. *But two words do not make a letter of over one hundred words obscene, lewd or lascivious.* See *Walker v. Popenoe,* 149 F. 2d 511 (App. D. C.): "The statute does not bar from the mails an obscene phrase or sentence." It cannot be that the writer of a letter containing two monosyllabic words to his wife and never meant to be an obscene publication is to be condemned as a criminal, while authors of hundreds of books that freely circulate in this country and contain the very same words or expressions are immune from prosecution because the writings are considered literature. The Act makes no distinction between literary and non-literary publications. It is the courts that have construed the statute so as not to apply to writings *even though they contain the very words used in this letter,* if the primary purpose of the writer is not to deprave and corrupt the morals by arousing and implanting obscene, lewd or lascivious thoughts and desires.

In determining whether a writing is obscene, it is necessary to consider the sender-addressee relationship. The same writing mailed to one addressee could correctly be considered obscene; yet if mailed to a different person, it could not. *U. S. v. Dennett,* 39 F. 2d 564 (C. C. A. 2); *U. S. v. Levine,* 83 F. 2d 156, 158 (C. C. A. 2); *cf. U. S. v. One Book entitled Ulysses,* 72 F. 2d 705, 708 (C. C. A. 2).

In *U. S. v. Wroblenski,* 118 Fed. 495, (D. C. Wis.) it was held that the mailing of a private, sealed letter by a son to his mother charging her with adulterous intercourse with a son-in-law, did not constitute the mailing of a letter containing "obscene, lewd and lascivious" language. The court therein stated "It is atrocious in spirit, and indecedent in the plain implication of the language. . . . The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. *So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee and no such tend-*

ency can be imputed to this letter to the mother of the defendant." (Emphasis supplied.)

In *Dunlop v. U. S.*, 165 U. S. 486, 500, 501, 17 S. Ct. 380, 41 L. ed. 799, this Court stated . . . "whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sexual desires and lascivious thoughts."

In *U. S. v. Barlow*, 56 F. Supp. 795 (D. C. Utah), appeal dismissed, 323 U. S. 805, 65 S. Ct. 25, 89 L. ed. 642, the court stated: "In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We must also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact, sexual excitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution."

It is clear that obscenity is measured by erotic allurement. The matter must suggest impure or libidinous thoughts and invite to lewd and lascivious practices and conduct, must create a desire for gratification of animal passions, must encourage unlawful indulgence of lust, or attempt to satisfy the morbid appetite of the salacious.

Measured by these criteria, it must be held that appellant's letter to his wife is not obscene, lewd or lascivious.

III.

Application of the Statute to This Letter Between Husband and Wife Is an Invasion of Petitioner's Right of Freedom of Speech Guaranteed by the First Amendment.

The statute as construed in this case makes it a criminal offense to communicate by mail to one's wife and punishes the petitioner although what he has communicated is not

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claimed or shown to have been done with an evil or sinister purpose. There is nothing dangerous in the sending of such a sealed letter by a husband to his wife which can or should be forbidden by the State. The policy of the law has always been to *protect* confidential communications between spouses. Certainly, there is no showing of a clear and present danger to our government or its institutions which could justify such censorship of the mails with the imposition of criminal sanctions. *Taylor v. State of Mississippi, et al.,* 319 U. S. 583, 63 S. Ct. 1200.

Justice Holmes dissenting in *Leach v. Carlile,* 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, stated: ". . . and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. . . . The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the post office. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so . . . But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it in this case."

See Justice Frankfurter concurring in *Hanegan v. Esquire,* 327 U. S. 146, 66 S. Ct. 456, who cited with approval the dissent of Justice Holmes in *Leach v. Carlile,* 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, as "to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned . . ."

Petitioner submits that the First Amendment forbids control of the post so far as this sealed letter from a husband to his wife is concerned. Certainly, there is here no clear and present danger either to the morals of the public or the institutions of our government. The identity of the interest of husband and wife, so long recognized, negatives the concept of that publication which is indispensable to the constitutionality of this criminal statute. Any attempt to restrict appellant's liberties as guaranteed by the First Amendment "must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." *Thomas v. Collins,* 323 U. S. 516, 528, 65 S. Ct. 315, 322. No such clear public interest justifies the invasion of petitioner's freedom of speech and right of privacy by the application of criminal sanctions against him. *U. S. v. C. I. O.,* 335 U. S. 106, 68 S. Ct. 1349; *Near v. Minnesota,* 283 U. S. 697, 51 S. Ct. 625; *Winters v. N. Y.,* 333 U. S. 507, 68 S. Ct. 665.

CONCLUSION.

In the last analysis, the decision sought to be reviewed shockingly denounces as criminal the sending of a confidential communication by a husband to a wife, thus overturning in a most dangerous way, a long standing rule of privilege. If not for privilege, the very Court officials who in the course of official business mail official documents (exhibits, etc.) in obscenity statute prosecutions would be subject to the same severe criminal penalties as petitioner. Significantly, *not one appellate decision can be found to support this result.* A case of first impression in the appellate courts has been decided with but a two sentence *per curiam* opinion without a citation to answer the important federal questions involved.

The very lack of authority for prosecuting a spouse[1]

1. Compare the following District Court decisions: *U. S. v. Wroblewski,* 118 Fed. 495 (letter from son to mother); *U. S. v. Musgrave,* 160 Fed. 700 (letter from husband to wife); *U. S. v. Reinheimer,* 233 Fed. 545 (letter from sender to himself).

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who mails a confidential letter to the other spouse under these circumstances indicates that those responsible for the administration of federal criminal justice have hitherto rejected such prosecutions. To uphold this conviction will open the door of the federal courts to thousands upon thousands of cases essentially involving domestic disputes; and there is no suggestion that state courts are incapable of coping with that problem.

Respectfully submitted,

David Berger,
Jacob Kossman,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 69.

UNITED STATES OF AMERICA

v.

JESSE MILLER SINCLAIR,

Petitioner.

On Writ of Certiorari to United States Court of Appeals for the Third Circuit.

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No. 69.

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v.

JESSE MILLER SINCLAIR,

Petitioner.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion in the Court of Appeals for the Third Circuit (R. 19) is reported in 174 F. 2d 933. There was no opinion in the District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered May 5, 1949 (R. 16). It affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania. The Petition for a writ of certiorari was filed May 12, 1949, and granted on June 21, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether a confidential communication between husband and wife can be the basis for the prosecution and conviction of the communicating spouse for violation of Section 211 of the Criminal Code, 18 U. S. C. (1946 ed.) 334.

2. Whether a letter from a husband to his wife disclaiming responsibility for her illness and charging it to her sexual misconduct with other men is "obscene, lewd or lascivious" within the meaning of 18 U. S. C. (1946 ed.) 334.

3. Whether the application of the statute making it a criminal offense for a husband to mail such a sealed letter to his wife is a violation of Petitioner's right of freedom of speech guaranteed by the First Amendment.

STATUTE INVOLVED.

Section 211 of the Criminal Code, 18 U. S. C. [1946 ed.] 334 provided in pertinent part as of the date of the offense involved in this case:

> Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

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STATEMENT OF FACTS.

Petitioner was indicted on September 8, 1948, charged with knowingly depositing for mailing an obscene, lewd and lascivious letter dated July 14, 1948 (R. 2). The letter was sent to petitioner's wife (R. 3), who was living with her mother because petitioner and his wife had no home (R. 5) but he was coming there weekends (R. 6). It was turned over to the postal inspector by petitioner's wife and she initialed a complaint against him (R. 7). Petitioner waived a jury trial (R. 1), and did not offer any evidence on his behalf but relied solely on a motion for judgment of acquittal (R. 12). He was found guilty of the offense of depositing in the United States mails an obscene letter and was sentenced to imprisonment for a period of one year and a day (R. 14). The Court of Appeals affirmed the judgment in a *per curiam* opinion (R. 15). Petition for certiorari was filed on May 12, 1949, and certiorari was granted on June 27, 1949 (R. 19).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Third Circuit erred:

1. In failing and refusing to hold that the letter between husband and wife was a confidential communication and therefore privileged.

2. In failing and refusing to hold that the letter from the husband to his wife was not "obscene, lewd, or lascivious" within the meaning of 18 U. S. C. (1946 ed.) 334.

3. In failing and refusing to hold that the statute as applied in this particular case violated Petitioner's right of freedom of speech guaranteed by the First Amendment.

SUMMARY OF ARGUMENT.

1. The Petitioner's letter to his wife was a privileged confidential communication and could not be the basis for a prosecution for violation of 18 U. S. C. 334.

2. The Petitioner's letter to his wife was not an "obscene, lewd or lascivious" letter.

3. The application of the statute in the circumstances of this case violated Petitioner's right of free speech under the First Amendment to the Constitution.

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ARGUMENT.

I.

Petitioner's Letter to His Wife Was a Confidential Communication and Hence Absolutely Privileged.

There can be no doubt of its purely personal, confidential character; there is therefore no need to rely upon the presumption that all marital communications are confidential. 8 *Wigmore on Evidence* (3d Ed.) pp. 640-641.

The expression in the letter "Have you told your wife how many men . . ." does not mean that the wife is to show this letter to her family. It asked petitioner's wife a question, and is obviously an attempt by a husband to shift the responsibility for his wife's illness. It is not a direction either express or implied, to reveal the contents of the letter itself. Merely because a husband writes to his wife reproaching her for misconduct does not detract from the confidential character of the communication nor deprive it of the privilege which protects against its disclosure without the sender's consent. *Lanham v. Lanham,* 105 Texas 91, 145 S. W. 336.

In *Wolfle v. United States,* 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, a case involving the use of the mails to defraud, in which a husband dictated a letter to his stenographer and, after transcription, sent it to the wife, this Court stated:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

In the instant case the communicating spouse made no voluntary disclosure of the letter to a third person. Hence, it remains privileged.

None of the exceptions recognized by the law where the husband is indicted for a crime against his wife are here applicable. In this case, petitioner is charged with violating the postal laws. He was neither indicted nor tried for committing a crime against his wife.

Consequently, the letter was privileged and could not be the basis for either a prosecution or conviction of petitioner.

The test for the exclusion of a confidential communication is not the actual state of marital harmony between the petitioner and his wife at the time of the trial. "The privilege is intended to secure such a guarantee against apprehension of disclosure as will induce absolute freedom of communication." *8 Wigmore* 3d Ed. 2341. This is the underlying reason why the subsequent death of one of the spouses or even divorce does not terminate the privilege.

The Solicitor General in his brief opposing the petition for certiorari suggested that the privilege was waived, relying on the statement made by petitioner's counsel, "I do not believe I can make any objection to that" (R. 9). However, restored to context, the record discloses that this statement had reference only to the question of whether petitioner had written and mailed the letter, which was the one that he had initialed (R. 11). There was no waiver of the right to raise the question of the privileged quality of the letter. The error in basing conviction on this privileged communication was clearly brought to the attention of the trial judge before he found petitioner guilty. When trial counsel argued in support of his motion for judgment of acquittal (R. 12), he contended that the letter was a

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confidential communication and could not be used as evidence to convict petitioner. The argument in support of the motion for judgment of acquittal was not reported stenographically and therefore does not appear in the record. The record does show that counsel for the Government replied to the argument (R. 12). The same Government counsel filed a brief in the Court of Appeals and supported it with oral argument. At no time did he suggest either in his brief or in the oral argument that petitioner's right to raise the question of privilege was barred by the asserted waiver. It is submitted that particularly since this was a trial before the court without a jury, there was no waiver, expressed or implied, of petitioner's fundamental right. *Cf. Glasser v. United States,* 315 U. S. 69. See also Rule 52 (b) of Federal Rules of Criminal Procedure: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

II.

The Letter Written to Petitioner's Wife Is Not Obscene, Lewd or Lascivious Within the Meaning of 18 U. S. C. A. Section 1461.

In *Swearingen v. U. S.,* 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, this Court held that by "obscene, lewd or lascivious" Congress meant to convey only one thought. This Court stated:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter *to corrupt the morals of the people.* The words 'obscene', 'lewd' and 'lascivious', as used in the statute, signify that form of immorality which has relation to sexual impurity,

and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.* Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, *calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.*" (Emphasis supplied.)

In the *Swearingen* case the asserted non-mailable matter was a newspaper article which described a certain person as a "red headed mental and physical bastard that flings filth under another man's name" and as one who would sell his mother's honor and "pimp and fatten on his sister's shame with as much unction as a buzzard gluts in carrion", as one who was known as the companion of strumpets, who had "reveled in lowest debauches," and otherwise called the person a coward, liar, pimp, poltroon, and one who could be easily bought.

This Court held the above language not "obscene, lewd or lascivious" within the meaning of the Act. It should be noted that *an obscene libel at common law involved publication.* In this case there is simply a private communication between husband and wife.

By the Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, 18 U. S. C. A. Section 334, the words "and every filthy" were added to the Act. The legislative history of this amendment reveals that *another and new class of nonmailable matter was intended by the use of this phrase.* (See 43 Cong. Record, part 1, p. 284):

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"Mr. Moon of Pennsylvania. Mr. Chairman, one word on behalf of the committee. I have no doubt Congress originally intended to create two distinct classes of nonmailable matter by the existing section. Indeed, the decision of the circuit court prior to the time of the Swearingen case had defined the word 'obscene,' or 'obscenity,' as that form of indecency which is calculated to promote the general corruption of morals. They had defined lewdness and lasciviousness as that form of immorality which has respect to sexual impurity. However, that distinct classification was overturned by the Supreme Court decision in the Swearingen case, which decided that owing to the juxtaposition of the words 'obscene,' 'lewd,' and 'lascivious' Congress had created but one class. Therefore feeling that Congress originally intended to create these two distinct classes of prohibition, on behalf of the committee I am entirely willing to put this language in the form offered by the gentleman from Tennessee (Mr. Houston), *which I think does create another class and a class that the department informs us it is very necessary should be excluded from the mails.*" (Emphasis supplied.)

In *U. S. v. Limehouse*, 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. ed. 843, the defendant was charged with the unlawful deposit of "a certain filthy letter and writing." Interpreting the Act, Justice Brandeis stated:

> "The letters contain much foul language; charged the addressees or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term. On the ground that no letter was obscene, lewd or lascivious within the meaning given to those terms in Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, the District

Court sustained a demurrer and quashed the indictment. . . . In Swearingen v. United States, decided in 1896, the indictment was under Revised Statutes, Section 3893, U. S. C. Title 18, Section 334, which made unmailable only 'obscene, lewd or lascivious' matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not 'calculated to corrupt and debauch the mind and morals of those into whose hands it might fall' and induce sexual immorality. 161 U. S. at 451, 40 L. ed. 766, 16 S. Ct. 562. The indictment here under review contains no reference to 'obscene, lewd or lascivious'. The charge is of depositing 'a certain filthy letter'. It is brought under the amendment to Section 3893 of the Revised Statutes made by Section 211 of the Criminal Code, Act of March 4, 1909, Chap. 321, 35 Stat. at L. 1088, 1129, U. S. C. Title 18, Section 334, which inserted the words 'and every filthy'. Now the clause reads 'every obscene, lewd or lascivious, and every filthy book, . . . letter.'

'The Lower Court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of noscitur a sociis, gave to 'filthy' the meaning attributed in the Swearingen case to the words 'obscene, lewd, or lascivious'. Thus, the Court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment, Congress added a new class of unmailable matter,—the filthy . . .'"

It is thus clear that the Court has sharply differentiated between language that is obscene, lewd or lascivious

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and language which is filthy. *Hence, an indictment charging the depositing of an obscene, lewd or lascivious letter cannot be sustained by proof of a letter that may be filthy but not obscene, lewd or lascivious.*

The test whether a letter is obscene, lewd or lascivious is: does the language used have a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd or lascivious desires and by inducing sexual immorality? *Swearingen v. U. S., supra; Dysart v. U. S.*, 272 U. S. 655, 71 L. ed. 461, 47 S. Ct. 234; Judge Bok's opinion in *Commonwealth v. Gordon, et al.*, 66 D. & C. 101 (Pennsylvania).

In the instant case there is nothing in the letter that would incite or excite sexual desires or passions in the wife-addressee nor was that the intent of the writer. This letter may be abusive, insulting and one that would arouse the indignation, anger and resentment of the recipient, but not sexual passions or desires. Quite the contrary. The reading of this letter instead of debasing the morals of the decent, correct and moral minded would have the very opposite effect. The letter is a bitter, perhaps indelicate, complaint by a husband to his wife. *But two words do not make a letter of over one hundred words obscene, lewd or lascivious.* See *Walker v. Popenoe*, 149 F. 2d 511 (App. D. C.): "The statute does not bar from the mails an obscene phrase or sentence." (And even the Solicitor General must concede that there are only two questionable words in this letter!) It cannot be that the writer of a letter containing two monosyllabic words to his wife and never meant to be an obscene *publication* is to be condemned as a criminal, while authors of hundreds of books that freely circulate in this country and contain the very same words or expressions

are immune from prosecution because the writings are considered literature. The Act makes no distinction between literary and non-literary publications. It is the courts that have construed the statute so as not to apply to writings *even though they contain the very words used in this letter,* if the primary purpose of the writer is not to deprave and corrupt the morals by arousing and implanting obscene, lewd or lascivious thoughts and desires.

In determining whether a writing is obscene, it is imperative to consider the sender-addressee relationship. The same writing mailed to one addressee could correctly be considered obscene; yet if mailed to a different person, it could not. *U. S. v. Dennett,* 39 F. 2d 564 (C. C. A. 2); *U. S. v. Levine,* 83 F. 2d 156, 158 (C. C. A. 2); *cf. U. S. v. One Book entitled Ulysses,* 72 F. 2d 705, 708 (C. C. A. 2).

In *U. S. v. Wroblenski,* 118 Fed. 495, (D. C. Wis.) it was held that the mailing of a private, sealed letter by a son to his mother charging her with adulterous intercourse with a son-in-law, did not constitute the mailing of a letter containing "obscene, lewd and lascivious" language. The court therein stated "It is atrocious in spirit, and indecedent in the plain implication of the language. . . . The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. *So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee and no such tendency can be imputed to this letter to the mother of the defendant.*" (Emphasis supplied.)

In *Dunlop v. U. S.,* 165 U. S. 486, 500, 501, 17 S. Ct. 380, 41 L. ed. 799, this Court stated . . . "whereas the

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true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sexual desires and lascivious thoughts."

In *U. S. v. Barlow*, 56 F. Supp. 795 (D. C. Utah), appeal dismissed, 323 U. S. 805, 65 S. Ct. 25, 89 L. ed. 642, the court stated: "In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We must also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact, sexual excitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution."

It is clear that obscenity is measured by erotic allurement. The matter must suggest impure or libidinous thoughts and invite to lewd and lascivious practices and conduct, must create a desire for gratification of animal passions, must encourage unlawful indulgence of lust, or attempt to satisfy the morbid appetite of the salacious.

Measured by these criteria, it must be held that appellant's letter to his wife is not obscene, lewd or lascivious.

The Solicitor General in his brief (p. 5) opposing the petition for certiorari stated: "Assuming *arguendo*, then, that the letter was not obscene, lewd or lascivious, but merely filthy, the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded." But a conviction cannot be sustained merely because the petitioner could have been differently indicted.

Whether the letter is "filthy," is of no consequence in determining petitioner's guilt. He was never indicted for mailing a "filthy" letter; he was never tried for mailing a "filthy" letter; he was never convicted of mailing a "filthy" letter. The record shows that the Trial Judge found petitioner guilty "of the offense of depositing in the United States mails *obscene* letters as charged" (R. 17). Clearly, petitioner's conviction cannot now be upheld upon the ground that the letter in question was "filthy." An affirmance of his conviction upon that ground would be a clear violation of due process. *Cole v. Arkansas,* 333 U. S. 196, 201.

The failure of the indictment to charge the defendant with mailing a "filthy" letter is not a "mere technicality." *Cf. Sutton v. U. S.,* 157 F. 2d 661 (C. A. 5); "A man shall not be charged with one crime and convicted of another." Marshall, C. J. in *The Hoppet v. U. S.,* 7 Cranch 389, 393.

III.

Application of the Statute to This Letter Between Husband and Wife Is an Invasion of Petitioner's Right of Freedom of Speech Guaranteed by the First Amendment.

The statute as construed in this case makes it a criminal offense to communicate by mail to one's wife and punishes the petitioner although what he has communicated is not claimed or shown to have been done with an evil or sinister purpose. There is nothing dangerous in the sending of such a sealed letter by a husband to his wife which can or should be forbidden by the State. The policy of the law has always been to *protect* confidential communications between spouses. Certainly, there is no showing of a clear and present danger to our government or its institutions which could justify such censorship of the mails with the

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imposition of criminal sanctions. *Taylor v. State of Mississippi, et al.*, 319 U. S. 583, 63 S. Ct. 1200.

Justice Holmes dissenting in *Leach v. Carlile*, 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, stated: ". . . and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. . . . The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the post office. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so . . . But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it in this case."

See Justice Frankfurter concurring in *Hanegan v. Esquire*, 327 U. S. 146, 66 S. Ct. 456, who cited with approval the dissent of Justice Holmes in *Leach v. Carlile*, 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, as "to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned . . ."

Petitioner submits that the First Amendment forbids control of the post so far as this sealed letter from a husband to his wife is concerned. There is here no clear and present danger either to the morals of the public or to the

institutions of the Government. There is here no *publication*. The relationship of husband and wife negatives that concept which is indispensable to the application of this criminal statute.

Any attempt to restrict petitioner's liberties as guaranteed by the First Amendment "must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." *Thomas v. Collins*, 323 U. S. 516, 528, 65 S. Ct. 315, 322. No such clear public interest justifies the invasion of petitioner's freedom of speech and right of privacy by the application of criminal sanctions against him. *U. S. v. C. I. O.*, 335 U. S. 106, 68 S. Ct. 1349; *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625; *Winters v. N. Y.*, 333 U. S. 507, 68 S. Ct. 665; *Cafeteria Employees Union, Local 302, et al. Angelos, et al.*, 320 U. S. 293, 64 S. Ct. 126.

CONCLUSION.

If the conviction is permitted to stand it will mean that no husband who believes his wife has committed sexual misconduct with other men could write to her in *non-legal terms* without subjecting himself to federal criminal prosecution for mailing an *obscene* letter. To sustain this conviction would overturn in a most dangerous way a long standing rule of privilege. But for this privilege, the very Government officials who in the course of their business mail documents (exhibits, etc.) in obscenity statute prosecutions would be subject to the same severe criminal penalties as petitioner. Significantly, *not one appellate decision can be found to support this result.* The very lack of au-

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thority for prosecuting a spouse[1] who mails a confidential letter to the other spouse under these circumstances indicates that those responsible for the administration of federal criminal justice have hitherto rejected such prosecutions. To uphold this conviction will open the door of the federal courts to a multitude of cases essentially involving domestic disputes; and there is no suggestion that state courts are incapable of coping with that problem.

It is respectfully submitted that for the reasons herein advanced petitioner's conviction should be reversed.

Respectfully submitted,

DAVID BERGER,
JACOB KOSSMAN,
Attorneys for Petitioner.

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[1] Compare the following District Court decisions: *U. S. v. Wroblenski*, 118 Fed. 495 (letter from son to mother); *U. S. v. Musgrave*, 160 Fed. 700 (letter from husband to wife); *U. S. v. Reinheimer*, 233 Fed. 545 (letter from sender to himself).

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 783

JESSE MILLER SINCLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 18) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1949 (R. 19). The petition for a writ of certiorari was filed on May 12, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner is immune from prosecution under Section 211 of the Criminal Code on the ground that the letter upon which the prosecution is based was a privileged communication to his estranged wife.

2. Whether the mailing of the letter involved constituted a violation of Section 211 of the Criminal Code as charged in the indictment.

3. Whether the application of the statute in the circumstances of this case violated petitioner's rights under the First Amendment to the Constitution.

STATUTE INVOLVED

Section 211 of the Criminal Code, 18 U.S.C. [1946 ed.] 334 provided in pertinent part as of the date of the offense involved in this case:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

On July 14, 1948, petitioner mailed a letter enclosed in an envelope addressed to his wife in her

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maiden name (R. 4, 9-10). The letter is reproduced at page 16 of the record. Petitioner and his wife had not been living together for several months (R. 6-7). His mother-in-law, with whom his wife was staying during this period, testified that her daughter and petitioner had no home and that he was visiting her week ends (R. 7). The letter in question was delivered to the mother-in-law's mail box by a postman on July 15, 1948 (R. 4). She took the letter from the mail box and gave it to her daughter, who opened it and read it in her presence (R. 4-5). The letter was thereafter turned over to the postal authorities (R. 8). On July 21, 1948, a post office inspector visited petitioner at the place where he was then living (R. 9) and petitioner admitted writing and mailing the letter, which he initialed in the inspector's presence (R. 9-10).

The indictment did not set out the letter *in haec verba,* but described it as "a certain obscene, lewd and lascivious letter and writing, which said letter and writing was enclosed in an envelope addressed and directed to Grace Somers, 234 West Summit, Haddonfield, New Jersey." The indictment also set forth the date and place of mailing and specified the statute violation of which was charged. (R. 2.) Petitioner waived a jury trial (R. 1), and he did not take the stand or offer any other evidence in his own behalf (R. 14). He was found guilty and sentenced to imprisonment for one year and a day (R. 17).

The Court of Appeals affirmed in a short *per curiam* opinion, stating that it had not been convinced that the conviction was not fully justified by the evidence or that any error had been committed (R. 18).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the letter for the mailing of which he was convicted was a privileged confidential communication from husband to wife and could not, therefore, be used as a basis for this prosecution. In the first place, if we assume that the letter was privileged, the privilege is not absolute and is waived if not claimed. 8 Wigmore, *Evidence* (3rd Ed.), Sec. 2340; *Steen* v. *First National Bank,* 298 Fed. 36 (C.A. 8); *Clark* v. *United States,* 245 Fed. 112 (C.A. 9). Far from claiming the privilege by objecting to the admission of the letter, petitioner's counsel stated, when counsel for the Government offered it in evidence, "I do not believe I can make any objection to that" (R. 11). And so far as appears from the record, petitioner did not object at any other point in the trial proceedings that the letter was privileged. Having thus conceded that the letter was admissible, he is barred from seeking reversal therefor. *Proffitt* v. *United States,* 264 Fed. 299 (C.A. 9).

More fundamentally, however, we submit that the letter was not privileged. We think that, as with the general rule against competency of one spouse as a witness against the other, the excep-

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tion of "necessity," in cases involving injury to the witness-spouse, is applicable to communications between husband and wife (See *United States* v. *Mitchell*, 137 F. 2d 1006, 1009, reaffirmed, 138 F. 2d 831 (C.A. 2), certiorari denied, 321 U.S. 794). The overriding considerations of public policy underlying the exception operate as imperatively to deny the privilege as to support the competency of the injured spouse. See 8 Wigmore, Sec. 2338(4); American Law Institute, *Model Code of Evidence*, Rules 215, 216. Here, the mailing of the letter was itself the crime and petitioner's estranged wife was the victim of the offense. *United States* v. *Mitchell, supra*, 137 F. 2d at 1008. In such circumstances, we think petitioner's claim of privilege is unavailing. See *Spearman* v. *State*, 68 Tex. Cr. 449, 152 S.W. 915 (1913); *Beyerline* v. *State*, 147 Ind. 125, 45 N.E. 772 (1897); *Doolittle* v. *State*, 93 Ind. 272 (1883).

Moreover, petitioner had been living apart from his wife for several months (R. 6-7). That he visited her on week ends does not necessarily connote continuance of the marital status. It is consistent, as well, with efforts to repair a breach in that status, or on the other hand, to widen the breach into absolute divorce. It is clear from the fact that he wrote such a letter and addressed it to her in her maiden name (R. 4, 16) that there was a breach. "* * * the application of the privilege to a communication made between husband

and wife *living in separation,* * * * cannot be conceded." 8 Wigmore, Sec. 2335.

2. Whether, before its amendment in 1909 (see *United States* v. *Limehouse,* 285 U. S. 424, 426), Section 211 of the Criminal Code made punishable the mailing of such letter as is here involved, on the ground that it was "obscene, lewd, or lascivious" as those words were construed in *Swearingen* v. *United States,* 161 U. S. 446, is a question that is certainly not free from doubt. But the insertion of the words "and every filthy", in 1909, was prompted by a Congressional view that the Court, in the *Swearingen* case, had mistaken the original purpose of Congress,[1] and it is far from clear that a sharp line can be drawn between "filth" and "obscenity". These considerations may justify the conclusion that the failure to mention "filthy" in the indictment is of little significance since Congress originally intended that class of matter to be subsumed within the words "obscene, lewd and lascivious"—words which were used in the indictment (R. 2).

Even if the legislative addition of the words "and every filthy" is to be treated, generally, as creating "a new class of unmailable matter" *United States* v. *Limehouse,* 285 U. S. 424, 426, the failure to use those words in the indictment would not seem, under the circumstances of this

[1] 43 Cong. Rec. 284, statement of Mr. Moon, quoted at Pet. 8-9.

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case, to be prejudicial error. Petitioner does not now contend, nor has he ever contended, that this letter was not filthy (Pet. 10), and this Court's language in *Swearingen* and *Limehouse* would, indeed, appear to preclude such a contention.

It cannot be said that the indictment failed to apprise petitioner of the crime charged with such reasonable certainty that he could make his defense and protect himself after judgment against another prosecution for the same offense. *Rosen* v. *United States,* 161 U. S. 29, 40; *Price* v. *United States,* 165 U. S. 311; *Rinker* v. *United States,* 151 Fed. 755 (C. A. 8); *Timmons* v. *United States,* 85 Fed. 204 (C. A. 6). It positively identified the letter and specified the statute alleged to have been violated. This was sufficient. Rule 7(c), F. R. Crim. P.; *Koa Gora* v. *Territory of Hawaii,* 152 F. 2d 933 (C. A. 9), certiorari denied, 328 U. S. 862; cf. *Hagner* v. *United States,* 285 U. S. 427, 431; *Kramer* v. *United States,* 166 F. 2d 515, 519 (C. A. 9).

Assuming *arguendo,* then, that the letter was not obscene, lewd or lascivious, but merely filthy, the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded. See *Hagner* v. *United States, supra; Koa Gora* v. *Territory of Hawaii, supra,* at 935; Rule 52(a), F. R. Crim. P. Had petitioner attacked the indictment, before trial, for failure to mention the word "filthy", a new indictment including the word could have been

obtained and the end result would have been the same.

Petitioner proffers no showing of prejudice and it is difficult to conceive of any. At the trial, petitioner's counsel said "I do not think there is anything to be said on the factual side." (R. 14). This would have been an equally accurate statement had the indictment contained the word "filthy".

3. Petitioner's attack (Pet. 12-14) upon the instant application of the statute as an invasion of his constitutional right of free speech guaranteed by the First Amendment seems baseless.

That there is no inconsistency between a statute barring obscene and other illegal matter from the mails and the First Amendment has long been settled. *Ex parte Jackson,* 96 U.S. 727; *In re Rapier,* 143 U.S. 110; *Public Clearing House* v. *Coyne,* 194 U.S. 497; *Donaldson* v. *Read Magazine,* 333 U.S. 178; *Coomer* v. *United States,* 213 Fed. 1 (C.A. 8); *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385 (C.A. 6); *Knowles* v. *United States,* 170 Fed. 409 (C.A. 8); *Harman* v. *United States,* 50 Fed. 921 (C.C.D. Kans.); cf. *Winters* v. *New York,* 333 U.S. 507. Obscenity and filth are themselves substantive evils, and penalties imposed for such language have never been tested in the "clear and present danger" terms applicable to utterances which embody the appeals to reason given the highest constitutional sanctity.

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CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 69

JESSE MILLER SINCLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 15) is reported at 174 F. 2d 933.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1949 (R. 16). The petition for a writ of certiorari was filed on May 12, 1949, and was granted on June 27, 1949 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a letter from a husband to his estranged wife, in which he accused her in foul and indecent language of adultery and perverted sexual practices, is a privileged communication, and, if so, whether the privilege was waived by his failure to raise the question of privilege at his trial for the offense of sending the letter through the mails.

2. Whether Section 211 of the Criminal Code, prohibiting the mailing of obscene and filthy letters and other materials, applies to and may constitutionally be applied to the mailing of such a letter to one's spouse.

3. Whether such a letter was "obscene" as well as "filthy," and, if "filthy" only, whether the failure of the indictment to use that term in describing the letter was a fatal defect requiring reversal, though raised for the first time on appeal.

STATUTE INVOLVED

Section 211 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 334; now 18 U. S. C. [1948 Revision] 1461) provided in pertinent part:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be con-

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veyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Count 1 of a two-count indictment (R. 2) filed September 8, 1948, in the District Court for the Eastern District of Pennsylvania charged that petitioner on or about July 14, 1948, in Media, Pennsylvania, deposited in the mail "a certain obscene, lewd and lascivious letter and writing" enclosed in an envelope addressed to Grace Somers, Haddonfield, New Jersey, in violation of Section 211 of the Criminal Code of 1909, *supra,* (now 18 U. S. C. [1948 Revision] 1461). Count 2, charging the mailing of a like letter to Grace Somers' mother, was dismissed solely for lack of proof that petitioner himself mailed it (R. 10-11), though the proof showed that he wrote it and that it was received by the addressee in the same mail that brought the other letter (R. 3-4, 5). Following a trial before a judge, a jury having been waived (R. 1), petitioner was found guilty on count 1 and sentenced to imprisonment for one year and a day (R. 14). On appeal to the Court of Appeals for the Third Circuit, the judgment of conviction was affirmed (R. 16).

The Government's evidence may be summarized as follows:

On July 14, 1948, petitioner mailed the letter involved in count 1 in an envelope addressed to his wife in her maiden name, Grace Somers (R. 3, 7-8). In this letter, which is reproduced at R. 13, he accused his wife, in foul and indecent language, of adulterous and perverted sexual relationships with men, and asked her if she had "told [her] family" about such conduct. Petitioner and his wife had not been living together for several months (R. 5-6). His mother-in-law, with whom his wife was staying during this period, testified that her daughter and petitioner "had no home" and that he was visiting her week ends (*ibid.*). The letter in question was delivered to the mother-in-law's mail box by a postman on July 15, 1948 (R. 3). She took the letter from the mail box and gave it to her daughter, who opened it in her presence and "started to read it but couldn't finish" (R. 4). When Mr. Somers, petitioner's father-in-law, came home, it was decided that this letter and the letter addressed to the mother-in-law (see p. 3, *supra*) "should be turned over to the proper authorities" (R. 4-5). Accordingly, petitioner's wife and her parents turned the letters over to the postal authorities in Camden, New Jersey (R. 6). On July 21, 1948, a post office inspector visited petitioner at the boarding or rooming house in Ridley Park, Pennsylvania, where he was living, and petitioner

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admitted writing and mailing the letter addressed to his wife (R. 7-8).

SUMMARY OF ARGUMENT

I

The letter was not a privileged communication. It was the very basis of the crime denounced by the statute—a part of the corpus delicti. Without disclosure of the letter it would be impossible to establish the crime at all. Thus, application of the privilege rule would destroy the force of the statute in cases of this class. Other considerations make it clear that the letter was not privileged. First, petitioner was living in separation from his wife when he wrote the letter. There was active hostility between them. No privilege arises under such circumstances. Secondly, the letter was turned over by the wife to a third party, the postal authorities. Under the weight of authority, the confidential communication privilege ceases when a letter comes into the possession of a third party. Finally, under a well recognized exception to the privileged communication rule, there is no privilege where the spouse-recipient of the communication is the person primarily aggrieved by the offense for which the other spouse is being tried. This exception is here applicable since petitioner's estranged wife was, in a real sense, the victim of petitioner's offense.

In any event, even if the case falls within no exception to the privilege rule, petitioner here waived the privilege by failing to object to the introduction of the letter at the trial.

II

Section 211 of the Criminal Code, on which this prosecution was based, declares *every* obscene or filthy letter, etc., nonmailable, and provides for the punishment of *whoever* knowingly deposits such a letter in the mails. No exception is provided for the case of mail passing between spouses. Nor is there any sound reason for reading such an exception into the unqualified language of the statute. It was so held in the only decision under the statute which considers this point. *United States* v. *Musgrave*, 160 Fed. 700 (E. D. Ark.).

The First Amendment's guaranty of free speech is no bar to so interpreting the statute. It has long been settled that barring obscene and other illegal matter from the mails invades no rights guaranteed by that Amendment.

III

Petitioner in effect concedes that the letter contained "filthy" language, but denies that it was "obscene," as charged, and as that word was construed in *Swearingen* v. *United States*, 161 U. S. 446. But the objectionable language plainly related to sexual impurity. It therefore was probably "obscene" even under the *Swearingen* test,

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since it was principally the absence of sexual filth in the *Swearingen* document that excluded it from the definition of "obscene" adopted in that case.

But even it be assumed, *arguendo,* that petitioner's letter was merely "filthy" and not "obcene," the omission of the former word from the indictment in characterizing the letter was harmless and should be disregarded. The statute bars both types of literature from the mails, and the indictment positively identified the letter and specified the statute alleged to have been violated. The indictment, therefore, apprised petitioner of the crime charged with sufficient certainty to enable him to make his defense and to protect him after judgment against a second prosecution for the same offense. This was sufficient. No showing of prejudice is made, and none is conceivable.

ARGUMENT

I

The Letter in Question Was Not a Privileged Communication: and Even If It Were, Petitioner Waived the Privilege by Failing to Claim It

Petitioner contends (Pet. 5-6) that the letter on which count 1 of the indictment was predicated was a confidential communication from himself to his wife and that therefore, under common-law principles, it was "absolutely privileged," erroneously received in evidence, and erroneously permitted to be "the basis for either a prosecution or conviction."

We do not believe, however, that the doctrine of privileged communications is applicable to the letter mailed by petitioner to his estranged wife in this criminal proceeding brought under Section 211 of the Criminal Code, *supra*, pp. 2-3. That statute in clear and unambiguous language makes it a crime for any person to knowingly mail obscene or filthy letters, which language is plainly broad enough to include letters of that character mailed by a husband to his wife. In the case at bar, petitioner's letter was not, therefore, merely an item of collateral proof that petitioner had committed the crime denounced by the statute; it was the very basis of the crime itself—a part of the corpus delicti. Without disclosure of the contents of the letter there could be no legal judicial determination that it was or was not of the class of letters interdicted by the statute. Consequently, application of the privilege rule to petitioner's letter would leave the statute without force in this case, for it would have the effect of making it impossible to establish the crime at all. In short, it would nullify the statute *pro tanto*. Obviously, a rule of evidence may not be properly invoked where its application will produce that result. Moreover, various other considerations make it clear that the letter here involved was not a privileged communication.

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At common law,[1] certain types of "communications," notably those between husband and wife, and between attorney and client, were recognized as "privileged," provided certain conditions (such as the requirement that the communication be made in confidence) were fulfilled. By "privileged" was meant that the person making the communication was privileged to forbid the disclosure of its contents in a court of law by the person to whom it was made. It was a rule of evidence designed to suppress the elicitation of the full truth about some matter in issue because of the realization or belief that, despite the desirability of full development of the truth, compulsory disclosure of confidential communications by one spouse to the other or by a client to his attorney would tend to prevent or diminish the giving of such confidences, which it is a policy of the law to foster.[2] See 8 Wigmore, *Evidence* (3d ed.), §§ 2285, 2290-2292, 2332-2337; Underhill, *Criminal Evidence* (4th ed.), § 330; 3 Wharton, *Criminal Evidence* (11th ed.), § 1211. For several reasons, we submit, petitioner cannot rely upon this doctrine of privilege.

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[1] The applicable law on this phase of the case is the common law as interpreted and applied in the light of reason and experience. Rule 26, F.R. Crim. P.; *Wolfle* v. *United States*, 291 U.S. 7, 12; *Funk* v. *United States*, 290 U.S. 371.

[2] Sharply to be distinguished from the confidential communication privilege, in so far as it relates to the marital relationship, is the privilege of each spouse to refuse to testify against, or suffer adverse testimony by, the other. See 8 Wigmore, *Evidence* (3d ed.), §§ 2227-2245, 2334(2).

A. *The privileged communication rule has no application where the spouses are living in separation.*—Since "the privilege, obviously, is applicable only to communications made while the marital status obtains," the "application of the privilege to a communication made between husband and wife *living in separation* * * * cannot be conceded; for here the policy of the privilege does not apply * * *, since the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence" [italics in the original]. 8 Wigmore, *Evidence* (3d ed.), § 2335(1). *Holyoke* v. *Estate of Holyoke,* 110 Me. 469, 474 (1913), states this rule and its underlying principle as follows:

> But since the [privilege] rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the purposes of marriage, we think it should not apply when the parties are living in separation, * * * and the one making the communication is actively hostile to the other, and is known to be so. There is no suggestion of confidence in such relation. The parties are put on their guard. * * *

It is clear that the letter in question was not a privileged communication because petitioner was living in separation from his wife at the time he wrote it. He had, in fact, been living apart from her for several months (*supra,* p. 4). That he

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visited her on week ends does not necessarily connote continuance of the marital status. It is consistent, as well, with efforts to repair a breach in that status, or, on the other hand, to widen the breach into absolute divorce. It is clear from the fact that he wrote such a letter and addressed it to her in her maiden name (*supra*, p. 4) that there was a breach. In addition to accusing his wife of vile sexual conduct, he wrote her that "since you want trouble we shall have it" (R. 13). So incensed was the wife by the abusive accusations in the letter, furthermore, that she immediately turned it over to the postal authorities. Obviously, there existed between these spouses no element of the marital harmony and mutual confidence which are at the root of the privileged communication principle. On the contrary, they were "actively hostile" to each other, and there was "no suggestion of confidence" in their relations (*Holyoke* v. *Estate of Holyoke*, quoted *supra*). The very reason for the privilege rule is thus here absent.

B. *A confidential letter from one spouse to the other is admissible if it comes into the possession of a third person.*—While the decisions are not uniform, the weight of authority is that a letter from one spouse to the other, though it contain confidential matter, is admissible in evidence against the sender where it comes into the possession of a third party (including prosecution authorities). The opposing considerations on this point seem to be as

follows: in 8 *Wigmore*, sec. 2339, it is urged that documents of communication voluntarily delivered to a third person by the addressee-spouse should retain the privilege "for otherwise the privilege could by collusion be practically nullified for written communications"; against the privilege, it has been contended that in the interest of obtaining the truth the privilege should be strictly construed, and that delivery of a written communication to a third person is analogous to the rule that a third person who overhears a conversation between husband and wife may testify concerning it. 8 Wigmore, sec. 2339. A large majority of American courts have followed the latter reasoning. *Lloyd* v. *Pennie*, 50 Fed. 4, 8-11 (N. D. Cal.); *Caldwell* v. *State*, 146 Ala. 141, 143-144 (1906); *McNeill* v. *State*, 117 Ark. 8, 12-14 (1915); *People* v. *Swaile*, 12 Cal. App. 192, 195-196 (1909); *State* v. *Hoyt*, 47 Conn. 518, 540 (1880); *State* v. *Buffington*, 20 Kans. 599, 613-615 (1878); *State* v. *Morgan*, 147 La. 205, 222-224 (1920), certiorari denied, 253 U. S. 498; *State* v. *Wallace*, 162 N. C. 622, 629-630 (1913); *Whalen* v. *State*, 12 Ohio C. C. 584, 587-590 (1896); *State* v. *Mathers*, 64 Vt. 101 (1891); *State* v. *Nelson*, 39 Wash. 221, 228 (1905); 23 Am. & Eng. Encyc. of Law (2d Ed.) 97. *Contra: Bowman* v. *Patrick*, 32 Fed. 368 (C.C.E.D. Mo.); *McKie* v. *State*, 165 Ga. 210, 214-221 (1927); *Commonwealth* v. *Fisher*, 221 Pa. 538, 543-544 (1908). "The question was not whether the

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husband or wife could have been compelled to produce this evidence," said the court in *State* v. *Hoyt, supra*, 47 Conn. at 540, "but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not."

Here, petitioner's wife was not compelled or permitted over objection to testify to the contents of the letter in question, nor did she produce it at the trial. She voluntarily turned the letter over to the post office authorities immediately following her receipt of it and long before the commencement of the trial. It was introduced in evidence by the Government and identified by a post office inspector, who testified that petitioner admitted to him having written and mailed it and that he (petitioner) initialed it as a token of this admission (R. 8). On this independent ground, therefore, it was not privileged.

C. *The privileged communication rule is not applicable where the spouse-recipient of the communication is the person aggrieved by the commission of the offense for which the other spouse is being prosecuted.*— Under a recognized exception to the privileged communication rule as applied to spouses, the spouse-recipent of a confidential communication is at liberty to disclose the communication where he or she is the person primarily aggrieved by the commission of the offense for which the other spouse is being prosecuted. 3

Wharton, *Criminal Evidence* (11th Ed.), § 1251; 8 Wigmore, *Evidence* (3d Ed.), § 2338; *Doolittle* v. *State*, 93 Ind. 272, 274-275 (1883); *Beyerline* v. *State*, 147 Ind. 125, 129-133 (1897); *E. W. M.* v. *J. C. M.*, 2 Tenn. Ch. App. 463, 472-487 (1897); *Spearman* v. *State*, 68 Tex. Cr. 449, 460-462 (1913); see American Law Institute, *Model Code of Evidence*, Rules 215, 216. This exception is founded on the same principle of "necessity" which permits one spouse to testify against the other, notwithstanding the general prohibition against such testimony, where the offense for which the defendant spouse is on trial is essentially an offense against the witness-spouse. See *United States* v. *Mitchell*, 137 F. 2d 1006, 1008-1009, reaffirmed, 138 F. 2d 831 (C. A. 2), certiorari denied, 321 U. S. 794 (wife-victim of defendant in a Mann Act prosecution *held* properly allowed to testify against him). The overriding considerations of public policy underlying the exception in the latter type of case operate no less imperatively to require the exception in cases of the former type. 8 Wigmore, *Evidence* (3d Ed.), § 2338. Thus, in *E. W. M.* v. *J. C. M.*, *supra*, 2 Tenn. Ch. App. at 486-487 (suit for divorce on grounds of cruelty; admission in evidence of a vituperative letter from defendant to plaintiff, written after their separation, challenged as violating the privileged communication rule), it was said:

> * * * we are of the opinion that the letter admitted as evidence over the objection of the

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> defendant is admissible if it be found to contain matters of such character as would constitute by its writing and delivery to [plaintiff] an act or acts of cruelty and indignity. * * * The objection made to the letter was on the ground that it was a confidential communication. To urge the exclusion of this letter on the ground of promoting for the sake of public policy the mutual trust, love, confidence, freedom and frankness, would to any mind, other than the strictly legal, seem the height of irony and mockery. * * *

Here, the mailing of the letter was itself the crime and petitioner's estranged wife was, in every real sense, the victim of the offense. True, technically speaking, the offense was the unlawful depositing of offensive matter in the mails, just as in the *Mitchell* case, *supra* (see 137 F. 2d at 1008-1009), the offense was, strictly, "not a crime against the person of the wife, but a crime against interstate commerce." But, realistically, petitioner's offense was directed against his estranged wife. Consequently, for this additional independent reason, the letter was not inadmissible as a privileged communication.

D. *In any event, assuming the letter was privileged, the privilege was waived.*— It is well settled, of course, that the privilege of a spouse to forbid the disclosure of a confidential communication, like any privilege, may be waived by the spouse making the communication. 8 Wigmore, *Evidence* (3d

Ed.), § 2340; 3 Wharton, *Criminal Evidence* (11th Ed.), § 1255. It is equally well settled that failure on the part of the spouse possessing the privilege to make timely objection to disclosure of the communication constitutes waiver. *Steen* v. *First National Bank*, 298 Fed. 36, 41 (C. A. 8); *Proffitt* v. *United States*, 264 Fed. 299, 302-303 (C. A. 9); *Hembree* v. *Commonwealth*, 210 Ky. 333, 334-335 (1925); *State* v. *Foster*, 164 La. 813, 830-833 (1927); *Ruch* v. *State*, 111 Ohio St. 580, 587-589 (1924); *Commonwealth ex rel. Berardino* v. *Berardino*, 96 Pa. Super. 288, 291-292 (1929); *McCormick* v. *State*, 135 Tenn. 218, 228-231 (1916); *Johnson* v. *State*, 95 Tex. Cr. 483, 487 (1923); 3 Wharton, *Criminal Evidence* (11th Ed.), § 1257. Far from claiming the now-asserted privilege by objecting to the admission of the letter in controversy, petitioner's counsel stated, when counsel for the Government offered it in evidence, "I do not believe I can make any objection to that" (R. 9). And so far as appears from the record, petitioner did not object at any other point in the trial proceedings that the letter was privileged. However, petitioner now asserts that there was no waiver of the privilege by his failure to assert it, in that when his "trial counsel argued in support of his motion for judgment of acquittal * * *, he contended that the letter was a confidential communication and could not be used as evidence to convict petitioner" (Petitioner's brief, pp. 6-7). This was too late. *Gibson* v. *United States*, 31 F.

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2d 19 (C.A. 9), certiorari denied, 279 U. S. 866. Having thus failed to make a timely objection to the admission of the letter, he is now barred from seeking reversal therefor. *Proffitt* v. *United States, supra,* 264 Fed. at 302-303.

II

Obscene or Filthy Mail Matter Sent to One's Spouse Is Within the Proscription of Section 211 of the Criminal Code, and the First Amendment's Guaranty of Freedom of Speech Is No Bar to So Construing the Statute

A. Section 211 of the Criminal Code (*supra,* pp. 2-3), on which this prosecution was based, declares that "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter" and provides for the punishment of "[w] hoever shall knowingly deposit, or cause to be deposited, for mailing or delivery" any material so declared to be barred from the mails. The unqualified and sweeping terms of this enactment forbid any reading into it of an exception in favor of one mailing such forbidden materials to one's wife—particularly where, as here, the wife is living in separation from her husband, and where the mailed matter so shocks and offends her that she forthwith turns it over to the postal authorities for punitive action against the sender.

The only decision that we have found that is squarely in point in this respect is *United States* v. *Musgrave,* 160 Fed. 700 (E. D. Ark.). That case

arose on a demurrer to an indictment charging the defendant with sending through the mails an obscene, lewd, and lascivious letter addressed to his wife, in alleged violation of Section 3893 of the Revised Statutes (predecessor of Section 211 of the Criminal Code). The court said (160 Fed. at 704-705):

> To sustain the contention of defendant would necessarily require the court to insert in the act an exception which Congress has failed to make. It would necessitate in almost every case a determination of the moral or mental condition of the addressee of every obscene matter sent through the mails, and, as stated by the assistant district attorney, "the jury would have to determine in every case whether the mind of the receiver of the letter could be corrupted, and an acquittal would result if the addressee were a woman of the town, were insane, were so high minded as not to be influenced by letters of this character, were of such immature years as not to understand the import of the words, were so depraved that he could sink no lower." A prostitute's mind, or that of a degenerate, may not be open to any immoral influences, and the receipt of a lascivious or lewd letter, book or picture may not corrupt their minds because they are beyond such influences. Would that fact be a defense to a prosecution under this statute? * * * Or if publishers of such literature should use the mails for the purpose of sending it to re-

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> tail dealers, who may have no intention of reading it, and whose minds for this reason could not be corrupted, but merely sell it, could it be successfully claimed that such acts would not be violative of the statute? * * * In the opinion of this court the language used clearly and convincingly shows that the intent of Congress was to prevent the abuse of a great privilege granted by a magnanimous government for the purpose of promoting the welfare and intelligence of its people, and not permit it to become a "vehicle for the transmission or circulation of mental filth."

"It matters not what the relationship between sender and sendee is," concluded the court (160 Fed. at 706), "or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, * * * have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute."

Of course, the statute does not prohibit the mailing of all correspondence on intimate subjects between husband and wife. Natural intercourse and candid discussion of the facts of life between husband and wife are not substantive evils, since the marital status permits them and thus purges them of immorality and indecency. Hence, corre-

spondence between a husband and wife on the permitted intimacies of the marital relationship, written in the confidence of that relationship is not considered to be obscene or filthy, and does not fall within the proscription of the statute. But this does not mean that the statute excepts from its purview all correspondence passing between spouses. The statute contains the broad language "Every" and "Whoever", without any exception as to persons, and we have found nothing in its legislative history to indicate that an implied exception of that character was intended. As indicated, however, many communications on sexual matters between spouses would not be obscene. But the statute could still reasonably cover correspondence between husband and wife if the correspondence is obscene or filthy. Particularly is this so when the parties are estranged and the obscene or filthy remarks are directed at the other spouse.

That matters which are obscene or filthy within the meaning of the statute may pass between husband and wife is clear. For example, a package of sex-relationship pictures or magazines mailed by a husband to his wife for her to distribute would be no less obscene than if sent to someone else for the same purpose. In the circumstances, such pictures would surely be obscene or filthy within the meaning of the statute. And even if the pictures were not destined for distribution, they would

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still be within the proscription of the statute if their subject matter should be forms of intercourse which are foreign to and in violation of the pureness that surrounds matrimony. The subject matter of the pictures being abhorrent to the marital relationship, they would not be purged of their obscene and filthy characteristics by that relationship, since their evil effect would be as capable of corrupting the wife as it would any stranger. We believe that the same considerations are applicable to letters, for it is inescapable that a letter, couched in the vilest of language and pointedly referring to wantonly impure and beastly sexual relationships between human beings, is as much a substantive evil when sent to a wife as when sent to a stranger.

Oral upbraiding of one spouse by the other in vile and indecent language may become disorderly conduct, and as such it is a substantive evil. It is clearly repugnant to the marital relationship. A verbal attack by a husband upon his estranged wife in a letter is no less repugnant to that relationship, particularly where the letter is written in a malicious and revengeful spirit and where it contains words so foul and accusations so savage and degrading as to shock the wife into disclosing the communication to the members of her family or to the public authorities.

History reveals many instances of men abusing their wives and corrupting their morals in various ways, and no sound reason is apparent why this

result may not be accomplished through the use of obscene and filthy correspondence. There is nothing startling, therefore, in the contention that the Congress intended, when enacting the obscene mail statute, to prevent the use of the mails in carrying out these nefarious practices by husbands against their wives, as well as by stranger against stranger.[3] In the case at bar, the letter mailed by petitioner to his estranged wife contains accusations, emphasized by their vulgarity, which attack the other spouse in obscene and filthy language, and which focus on the mind two impure and immoral acts, i.e., adultery and sexual perversion, both of which are repugnant to the marital relationship and destructive of it. Those words, we submit, bring petitioner's letter within the proscription of the statute.

B. Petitioner's attack (Pet. 12-14) upon the instant application of the statute as an invasion of his constitutional right of free speech guaranteed by the First Amendment is clearly baseless. That there is no inconsistency between a statute barring obscene and other illegal matter from the mails and the First Amendment has long been settled. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194

[3] Cf. *Wilson* v. *United States*, 167 F. 2d 223 (C.A. 6), certiorari denied, 334 U.S. 838; *Cohen* v. *United States*, 214 Fed. 23, 29 (C.A. 9); and *Pappas* v. *United States*, 241 Fed. 665 (C.A. 9), affirming convictions of husbands charged with transporting their wives in interstate commerce for immoral purposes, in violation of the Mann Act (now 18 U.S.C. 2421).

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U. S. 497; *Donaldson* v. *Read Magazine,* 333 U. S. 178; *Coomer* v. *United States,* 213 Fed. 1 (C. A. 8); *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385, 388 (C. A. 6); *Knowles* v. *United States,* 170 Fed. 409, 411-412 (C. A. 8); *Harman* v. *United States,* 50 Fed. 921 (C. C. D. Kans.); cf. *Winters* v. *New York,* 333 U. S. 507, 510. Obscenity and filth are themselves substantive evils, and penalties imposed for such language have never been tested in the "clear and present danger" terms applicable to utterances which embody the appeals to reason given the highest constitutional sanctity.

III

The Failure of the Indictment to Describe the Letter in Question as "Filthy" Was Not Prejudicial

The indictment did not set out the letter *in haec verba,* but described it as "a certain obscene, lewd and lascivious letter and writing, which said letter and writing was enclosed in an envelope addressed and directed to Grace Somers, 234 West Summit, Haddonfield, New Jersey, which letter and writing is too obscene, lewd and lascivious to be set forth upon the records of this Honorable Court, but profert whereof is here made." The indictment also set forth the date and place of mailing and specified the statute, violation of which was charged. (R. 2.)

Petitioner at no time prior to or during the trial, so far as the record shows, raised the question of

whether the letter thus described and received in evidence was obscene, lewd, or lascivious. This point appears to have been raised for the first time on appeal, and it is again pressed before this Court (Pet. 7-12).

The argument is that the letter is not obscene, lewd, or lascivious as those words were construed in *Swearingen* v. *United States,* 161 U. S. 446. In that case, this Court held that a certain political diatribe, in which the author referred to his opponent in exceedingly coarse and vulgar language (see 161 U.S. at 447, note 1), was neither obscene, lewd, nor lascivious within the meaning of those words as used in Section 3893 of the Revised Statutes (the predecessor of Section 211 of the Criminal Code). It held that all three words "signify that form of immorality which has relation to sexual impurity," and that while the language in the document in question was exceedingly coarse, vulgar, and libellous, it contained nothing "of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the minds and morals of those into whose hands it might fall" (161 U. S. at 451).

When Section 3893 of the Revised Statutes was incorporated into the Criminal Code of 1909 as Section 211, the words "and every filthy" were added. The legislative history of this amendment indicates that Congress thought this Court, in the

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Swearingen case, had too narrowly construed the statute as it formerly stood, and added these words to bring within its scope "filthy" documents which did not necessarily relate to sexual impurity. See 43 Cong. Rec. 284, statement of Mr. Moon, quoted at Pet. 8-9; see also *United States* v. *Limehouse*, 285 U. S. 424, 426-427.

Petitioner now in effect concedes (see Pet. 10) that the letter in issue is "filthy"—it is, indeed, hardly deniable—but urges reversal of his conviction because, he says, it is not "obscene," "lewd," or "lascivious," as charged in the indictment.

While there is language in the *Swearingen* case which indicates that a publication, to come within the proscription of the statute as it stood before the 1909 amendment, must tend to suggest libidinous desires on the part of the reader, the principal emphasis of that decision was on the point that the document there in issue did not relate to sexual matters at all (except quite incidentally, by using such words as "pimp," etc.). In the case at bar, on the other hand, the objectionable portions of the letter quite obviously relate to "that form of immorality which has relation to sexual impurity" (161 U. S. at 451)—the precise aspect found lacking in the *Swearingen* case. We think therefore, that the letter here involved is at least "obscene," even under the *Swearingen*

test.[4] We suggest that this would be self-evident if the language involved here appeared in a newspaper or magazine which was generally circulated.

But assuming, *arguendo,* that the letter here involved was not obscene, lewd, or lascivious, but merely "filthy," the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded. See *Hagner* v. *United States,* 285 U. S. 427, 431; *Koa Gora* v. *Territory of Hawaii,* 152 F. 2d 933, 935 (C.A. 9), certiorari denied, 328 U. S. 862; Rule 52(a), F.R. Crim. P. Had petitioner attacked the indictment, before trial, for failure to mention the word "filthy," a new indictment including the word could have been obtained and the end result would have been the same. It cannot be said that the indictment failed to apprise him of the crime charged with such reasonable certainty that he could make his defense and protect himself after judgment against prosecution for the same offense.

---

[4] Webster's New International Dictionary (2d ed.) gives two definitions of "obscene" (exclusive of an obsolete meaning): (1) "Offensive to taste; foul; loathsome; disgusting," and (2) "Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; as, *obscene* language, dances, images."

It was the first of these two meanings of "obscene" that the Government argued for in the *Swearingen* case. This Court, however, in deference to the collocation of the word "obscene" with "lewd" and "lascivious" in the statute, adopted the second meaning. The essential difference between the two meanings is that, in its first sense, "obscene" means, generally, offensive to good taste, while in its second sense it means, specifically, offensive to chastity.

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Hagner v. *United States, supra,* 285 U. S. at 431; *Price* v. *United States,* 165 U. S. 311; *Rosen* v. *United States,* 161 U. S. 29, 40; *Rinker* v. *United States,* 151 Fed. 755 (C.A. 8); *Timmons* v. *United States,* 85 Fed. 204 (C.A. 6). It positively identified the letter and specified the statute alleged to have been violated. This was sufficient. Rule 7(c), F.R. Crim. P.; *Koa Gora* v. *Territory of Hawaii, supra;* cf. *Hagner* v. *United States, supra,* 285 U. S. at 431; *Kramer* v. *United States,* 166 F. 2d 515, 519 (C.A. 9).

Petitioner proffers no showing of prejudice and it is difficult to conceive of any. At the trial, petitioner's counsel said, "I do not think there is anything to be said on the factual side" (R. 12). This would have been an equally accurate statement had the indictment contained the word "filthy."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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ALEXANDER M. CAMPBELL,
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NOVEMBER 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 69.

JESSE MILLER SINCLAIR,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

EMANUEL REDFIELD,
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THE COURT PRESS, N. Y. C.

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OCTOBER TERM, 1949.

No. 69.

JESSE MILLER SINCLAIR,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

Motion of the American Civil Liberties Union for Leave to File a Brief as *Amicus Curiae*.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the American Civil Liberties Union, is an organization of many thousands of members devoted to the protection of the civil liberties guaranteed in the Constitution. It is interested in filing a brief as *amicus curiae* in the above entitled appeal because important questions of freedom of speech are involved.

The reason this motion is made at this date is that on June 16, 1949 the petitioner in person had requested the American Civil Liberties Union to file a brief on his behalf. Therefore, it was not expected that there would be any difficulty. Thereafter, a stipulation to file was sent to petitioner's attorney.

Nothing was heard from him although follow-up letters were sent. On November 2, 1949, petitioner's counsel informed the American Civil Liberties Union that he would not consent. The Solicitor General, however, by telephone, on November 2, 1949, stated that he had no objection to the filing of this brief.

Since there are civil liberties issues involved that are important, it is urgent that this motion be granted. The brief is hereto annexed.

Dated: New York, New York, November 2, 1949.

AMERICAN CIVIL LIBERTIES UNION,
By: EMANUEL REDFIELD,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 69.

JESSE MILLER SINCLAIR,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE.*

Facts.

The facts in this case are simple. Petitioner is charged with a violation of Section 1461, Title 18, U. S. C. A., in that, as the indictment charges, he deposited and caused to be mailed a certain writing which was obscene and which was addressed to his wife. The writing appears as Government Exhibit 1. He was convicted and sentenced to a year and a day for this offense.

Argument.

The statute does not apply to communications of the character charged in this case.

POINT I.

The statute is not applicable to the writing that was mailed.

The statute reads as follows:

> "Section 1461. MAILING OBSCENE OR CRIME-INCITING MATTER.
>
> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . . is declared to be non mailable matter and shall not be conveyed in the mails or delivered through any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be non mailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

It should be noticed that the indictment charged the petitioner with mailing an "obscene, lewd and lascivious letter and writing." It did not charge him with mailing a "filthy" letter. This is important, because "filthy" writings are in a different category. "Filthy" writings have been held by this Court to be a separate crime from "obscene, lewd and lascivious" ones. In *United States* v. *Limehouse*, 285 U. S. 424, this Court held that the word "filthy" was added to the statute after this Court held in *Swearingen* v. *United States* (1896), 161 U. S. 446, that "obscene, lewd and lascivi-

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ous" referred to sexual lust only and was the type of writing whose tendency was to corrupt the minds and morals of the persons into whose hands the writing might fall.

It should be noticed that the *Swearingen* case was followed in the recent case of the Mormon publication urging plural wives. *United States* v. *Barlow*, 56 F. Supp. 795, appeal dismissed 323 U. S. 805.

Since the complex question concerning the vagueness of the definition of "filthy" (*Winters* v. *New York*, 333 U. S. 507), and the separation of the crimes (*Stromberg* v. *California*, 283 U. S. 359) is not before the Court, the question takes on simpler aspects.

Is the writing, therefore, "obscene, lewd, and lascivious"? Under the test of the *Swearingen* case it is not. In that case a newspaper in abusive terms, such as "mental and physical bastard" libelled a person. This Court held that although the terms were coarse and vulgar, nevertheless, they were not "obscene, lewd and lascivious" within the definition of the statute. The Court held that although the three words are written disjunctively, nevertheless they were regarded as one. They collectively represent the same thing as "obscenity" at common law criminal libels, to wit, words that incite sexual lust and tend to corrupt the minds and morals of the persons in whose hands they may fall.

Bringing these principles to petitioner's case, we find that the words whether used as inquiry to his wife as to her moral looseness or whether to make inquiry into her medical status, nevertheless, have in their text no connotation of exciting sexual lust. They are words of vituperation hurled by an angry, impassioned hus-

band against a wife's sexual indiscretions. He might have used finer language but the circumstances militate against him.

In any event the letter does not arouse lust by any construction placed on it by reasonable minds (*Knowles* v. *United States* (8 Cir.), 170 Fed. 409, 410).

The likelihood is that in this case there could not be any arousing of lust because this letter was sent by petitioner to his own wife in a sealed envelope. It has been held that sending a letter in the mail to oneself is not within the statute. *United States* v. *Reinheimer*, 233 Fed. 545. Sending a letter to one's wife comes pretty close to the same doctrine.

It is, therefore, shocking to note that this petitioner received a prison sentence of a year and a day for having sent a coarse note in a sealed envelope to his wife.

POINT II.

The conviction should be reversed and the indictment dismissed.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for American Civil Liberties Union.

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JANUARY 9, 1950.*

Per Curiam Decision.

No. 69. SINCLAIR *v.* UNITED STATES. Certiorari, 337 U. S. 954, to the United States Court of Appeals for the Third Circuit. Argued November 9, 1949. Decided January 9, 1950. *Per Curiam:* The judgment is reversed. *United States* v. *Limehouse*, 285 U. S. 424; *Swearingen* v. *United States*, 161 U. S. 446. *Jacob Kossman* argued the cause for petitioner. With him on the brief was *David Berger*. *John R. Benney* argued the cause for the United States. With him on the brief were *Solicitor General Perlman*, *Assistant Attorney General Campbell*, *Robert S. Erdahl* and *Philip R. Monahan*. *Emanuel Redfield* filed a brief for the American Civil Liberties Union, as *amicus curiae*, urging reversal. Reported below: 174 F. 2d 933.

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